

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KATHERINE CALDERONE,

Plaintiff-Appellant,

v

HARDING & RUESS, INC.,

Defendant-Appellee.

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UNPUBLISHED

February 29, 2000

No. 212575

Berrien Circuit Court

LC No. 97-000109-NZ

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Plaintiff appeals her personal injury claim as of right from the trial court order that granted summary disposition to defendant pursuant to MCR 2.116(C)(7) on the ground that the statute of limitations barred the claim. We reverse.

On January 16, 1994, plaintiff slipped on water and ice and fell in the Harding's Friendly Market of St. Joseph. A few days before the expiration of the three-year statute of limitation, plaintiff began efforts to discover who owned the Harding's Friendly Market in preparation for filing a lawsuit. Plaintiff telephoned the state corporations and securities bureau and was told the names of all the corporations that do business as Harding's Friendly Market and Harding's Market. Ten corporations were listed with the state in January 1997 as doing business as Harding's Friendly Market or Harding's Market. Plaintiff telephoned the St. Joseph store, asked for the location of the corporate offices, and was told that they were at 211 Bannister in Plainwell. Plaintiff telephoned that office and was told that the Harding's Friendly Market in St. Joseph was one of their stores. Plaintiff visited the offices on Bannister and noted a sign for the "Hardings Markets Corporate Offices."

Based on these efforts plaintiff filed on January 15, 1997, a complaint against Hardings Markets West, Inc., the corporation located at 211 Bannister in Plainwell. Service was eventually completed on the attorney and state registered agent for Hardings Markets West, Inc. Hardings Markets West, Inc. responded on February 26, 1997, that it did not own the Harding's Friendly Market in St. Joseph. Plaintiff then contacted a Harding's Friendly Market in Schoolcraft and was told that the St. Joseph market was owned by defendant. Defendant was not listed with the state corporations and securities

bureau as one who did business as Harding's Friendly Market or Harding's Market but instead was listed as doing business as Harding's-St. Joseph.

On April 9, 1997, plaintiff moved to amend the complaint by adding two parties as defendants. Following a hearing on May 19, 1997, plaintiff filed an amended complaint adding only one new defendant, Harding & Ruess, Inc. Hardings Markets West, Inc. then filed a motion for summary disposition. The circuit court denied that motion without prejudice, allowing plaintiff the opportunity to conduct discovery on the issue of the existence of a partnership or joint venture between Hardings Markets West, Inc. and defendant. Hardings Markets West, Inc. soon thereafter settled with plaintiff. The only discovery conducted in this matter was the taking of the deposition testimony of W. David Gearhart and Jack Ruess.

Defendant then moved for summary disposition, arguing that the statute of limitations had run on the claim because the party was not added or served until after three years following the accident. The circuit court granted summary disposition to defendant, holding that a later added party is not related back to the date of the original complaint pursuant to *Hurt v Michael's Food Center*, 220 Mich App 169; 559 NW2d 660 (1996).

This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). In the July 1990 opinion of *Hayes-Albion Corp v Whiting Corp*, 184 Mich App 410; 459 NW2d 47 (1990), this Court, looking at the parallel federal rule, allowed a new party under the relation back doctrine to be added to a suit after the statute of limitations had run. *Id.* at 418-419. Less than a year later this Court, without referring to *Hayes-Albion*, citing *Gardner v Stodgel*, 175 Mich App 241, 249; 437 NW2d 276 (1989), held that the relation back doctrine for amendments to pleadings does not include a newly added party. *Employers Mutual Casualty Co v Petroleum Equipment, Inc.*, 190 Mich App 57, 63; 475 NW2d 418 (1991).

In *Hurt*, *supra* at 179, another panel of this Court displayed its discomfort with the *Employers Mutual* decision, stating:

Pursuant to Administrative Order No. 1996-4 [now MCR 7.215(H) Resolution of Conflicts in Court of Appeals Decisions], we are constrained to follow *Employers Mutual* and affirm the circuit court's ruling barring plaintiff Hicks' false imprisonment claim as untimely because the relation-back rule does not extend to the addition of a new party. However, were it not for the administrative order, we would follow *Hayes-Albion Corp v Whiting Corp* [citation omitted] and hold that the relation-back rule extends to the addition of a new party.

It is this line of cases that includes *Employers Mutual* and *Hurt* that the circuit court relied upon in its decision in the present case. There is, however, a law in this state that is determinative in this case, requiring reversal.<sup>1</sup> "A statutory exception to the *Employers Mutual* rule was enacted as part of tort reform legislation. In actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a nonparty who may be at fault shall be added upon motion

of a party filed within 91 days after identification of the nonparty.” Dean & Longhofer, Michigan Court Rules Practice (4<sup>th</sup> ed), § 2118.18, p 568. The statute referred to above, concerning “Tort actions; amended pleadings against nonparties ...,” states in part:

Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. [MCL 600.2957(2); MSA 27A.2957(2).]

In the present case plaintiff on or around February 26, 1997, discovered that Hardings Markets West, Inc. did not own the St. Joseph store. It was soon after that when plaintiff learned that defendant was the true owner of the store. Plaintiff filed a motion on April 9, 1997, to amend the complaint to add defendant. This was within the ninety-one days granted by MCL 600.2957(2); MSA 27A.2957(2) to move the court to add a new party in a personal injury action. Therefore, this case should go forward against defendant without any constraints imposed by the three-year statute of limitations. In light of our finding on this issue, we need not address plaintiffs’ remaining issues.

Reversed.

/s/ David H. Sawyer

/s/ Roman S. Gibbs

/s/ Gary R. McDonald

<sup>1</sup> Plaintiff raised this statute in her reply brief to defendant’s brief in opposition to her motion for leave to amend. The trial court did not address the application of this statute.